FEB 27 1943
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

J. O. BOMER, JR.,
Petitioner,
vs.
STATE OF TENNESSEE
ON MOTION OF
CHANCELLOR JOHN E. SWEPSTON
AND CHANCELLOR LOIS D. BEJACH,
Respondents

No. 713

REPLY BRIEF AND STATEMENT ON BEHALF OF STATE OF TENNESSEE OF OBJECTIONS TO JURISDICTION AND OPPOSITION TO PETITION OF J. O. BOMER, JR., FOR A WRIT OF CERTIORARI.

MARION G. EVANS,
J. S. ALLEN,
EDWARD P. RUSSELL,
CLARENCE E. CLIFTON,
Counsel for Respondent.

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MAY IT PLEASE THE COURT:

I.

This petition attempts to attack the validity of the judgment of the Supreme Court of the State of Tennessee, which denied certiorari and affirmed a judgment of the Court of Appeals of the State of Tennessee affirming the judgment of the Chancery Court of Shelby County, Ten-

nessee, and entering a decree permanently disbarring the petitioner, J. O. Bomer, Jr.

The proceeding for the disbarment of J. O. Bomer, Jr., was filed on December 30, 1940 by the Court of its own motion pursuant to the statutes of Tennessee (Code 1932, Sec. 9976) in the name of the State of Tennessee on motion of Chancellor John E. Swepston and Chancellor Lois D. Bejach. (R. 2-10).

The citation charged that on August 14, 1940, J. O. Bomer, Jr., had filed in the Chancery Court of Shelby County, Tennessee, a proceeding for the disbarment of Marion S. Boyd, a practicing member of the bar of that Court and at the time Attorney-General of Shelby County, Tennessee, and who was then being considered for appointment as Judge of the United States District Court for the Western District of Tennessee, which disbarment proceeding by Bomer against Boyd on the trial thereof, after the introduction of proof by Bomer, was dismissed because it was without merit. (R. 3, 41).

The citation further charged that on December 14, 1940 Bomer filed in the Chancery Court of Shelby County, Tennessee, a proceeding for the disbarment of William Gerber, who was then Attorney-General of Shelby County, Tennessee (having succeeded General Boyd on the latter's appointment as United States District Judge) which suit, on the admissions made by Bomer himself under oath in the preliminary investigation made by the Court, was dismissed as filed without justification and without probable cause. (R. 4 and 5).

The numerous charges contained in the citation are summarized as follows in the decision of the Supreme Court of the State of Tennessee:

> "The substance of the citation against Bomer was:
> (1) That he made false and scandalous statements concerning the defendants Boyd and Gerber, and that he did so wilfully and maliciously, without making any real investigation; and
> (2) That he instituted said proceedings upon no just grounds, without any probable cause, and was actuated by motives of personal hatred and ill will; that he was abusing the Court's process as a means of carrying out his desire to wreak vengeance upon them, he having conceived the idea that the defendants had been active in securing his (Bomer's) disbarment on May 21, 1937."
> (R. 200-201).

As will be hereinafter pointed out in our objections to the jurisdiction of this Court and in our reply to the specifications of error assigned by Bomer in this Court, there was no Federal question involved.

II.

OBJECTIONS TO THE JURISDICTION OF THIS COURT:

(1) The petition was not filed within the period of three months after entry of final judgment in the Supreme Court of Tennessee.

The Supreme Court of the State of Tennessee denied Bomer's application for writ of certiorari to the Court of Appeals of the State of Tennessee, by written opinion filed for publication June 2, 1942. (R. 200; 162 S.W. (2d) 515); and final order denying certiorari was entered on June 2, 1942 (R. 214).

Petition to rehear was filed by Bomer on June 16, 1942, which was denied in opinion filed by the Court June 27, 1942 (R. 213) and formal order was entered on June 27, 1942 denying said petition to rehear (R. 215).

Subsequently, Bomer filed in the Supreme Court of Tennessee a petition for leave to file a second petition to rehear. This petition (as well as the rules of Court) shows on its face that it is a petition **for leave** to file a second petition for rehearing and that such second petition can not be filed as a matter of right, but is dependent upon permission being granted by the Court. (R. 233, 234).

The Supreme Court of the State acted upon this petition **for leave to file a second petition to rehear** on July 25, 1942 and denied **leave** to file such second petition. (R. 216).

Subsequently, further application for **leave** to file a third petition for rehearing was made by Bomer and the Supreme Court of the State acted on this application on September 8, 1942, and denied the petition of Bomer asking for **leave** to file a third petition to rehear. (R. 217).

Rule 32 of the Supreme Court of Tennessee provides that

> "petitions for rehearing must, in all cases, be presented to the Court within ten days after the opinion in the case sought to be re-examined is announced, except decisions made within the last ten days of the term. In such cases, the petition must be presented as soon after the decision is made as practicable and prior to adjournment of the term."

It is doubtful if Bomer's petition to rehear filed June 16, 1942 was operative to suspend the time for application for petition for writ of certiorari in this Court because that petition was not filed within ten days after his petition for certiorari had been denied by the Supreme Court of the State on June 2, 1942.

But, assuming that the time for filing the instant application was suspended until disposition of this petition to rehear (as the same was entertained and acted upon as such by the Court), the three months' time began to run from June 27, 1942, and was not suspended by the two subsequent applications made by Bomer **for leave to file**, respectively, his second and third petitions to rehear, which leave was not granted in either instance.

Morse vs. U. S., 270 U.S. 151, 153, 154; 70 L. Ed., 518, 519; 46 S.Ct., 241.

Gypsy Oil Co. vs. Escoe, 275 U.S., 498; 72 L. Ed., 393; 48 S.Ct., 112.

U. S. vs. Seminole Nation, 299 U.S. 417; 81 L. Ed., 316.

The determination of the point whether the time for making application for a writ of certiorari in this Court was suspended by the two petitions **for leave** to file the second and third petitions for rehearing is, after all, immaterial because these applications for leave to file petitions for rehearing were denied on July 25, 1942 and September 8, 1942, respectively. (R. 216; 217).

Under **28 U.S.C.A., Sec. 350**, the time for making application in this Court for a writ of certiorari in this case was limited to three months, which period, therefore, in any event, had expired not later than December 8, 1942.

The petition was not filed in this Court until February 8, 1943 and under the express provisions of Section 350 can not be allowed or entertained.

(2) There was no Federal question involved in the decisions of the Court of Appeals or Supreme Court of Tennessee.

On the day of trial an amendment to the answer was filed by Bomer averring:

> "That any statement orally or made in writing made by defendant of which complaint is made in this cause were within the constitutional privileges guaranteed to every citizen respecting freedom of speech by the Constitution of the United States and of the State of Tennessee, and defendant relies upon same as a defense in this action." (R. 44).

Bomer recognized that this contention was not substantial and the same was abandoned by him and was not raised or presented in any way to the Court of Appeals of Tennessee either in his Assignments of Error or Brief and Argument. (R. 85; R. 144).

In his petition for certiorari filed in the Supreme Court of Tennessee, Bomer invoked Article I, Sections 8 and 17 of the Constitution of Tennessee on the point (made in his assignments in the Court of Appeals and Supreme Court) questioning the validity of the order of the trial Court under which Judges Adams and Hamner sat by interchange in the place and stead of Chancellors Swepston and Bejach. (R. 164; 166; R. 92).

The validity of the order for interchange on constitutional grounds was raised by Bomer for the first time in

the Supreme Court of the State as a basis for a contention that the decision of the Court of Appeals was void as, under the Tennessee statutes, it is provided that appeals on constitutional questions shall go direct to the Supreme Court and only that Court has jurisdiction. (R. 164; 166).

Also, in his assignments of error in the Court of Appeals and in his petition for certiorari to the Supreme Court of the State, Bomer broadly contended that

> "An attorney-at-law who acts within his constitutional rights in criticizing the Court would not be guilty of conduct such as to render him unfit to practice his profession." (R. 168; R. 94),

under Tennessee law as declared by the Supreme Court of Tennessee in In Re: Hickey, 149 Tenn., 346.

This effort of the defendant Bomer to evade the effect of the decision of the Court of Appeals against him presented questions primarily involving the construction of the statutes of the State and their application within the provisions of the Constitution of the State. No provision of either the Federal or State Constitution had been invoked at any time prior to the decision of the cause by the Supreme Court of the State on June 2, 1942 (either in the lower Court, the Court of Appeals or in the Supreme Court) to challenge the constitutionality of the statutes under which the interchange was effected —Section 9894 providing that the judges and chancellors are judges and chancellors of the State at large; Section 9896 providing that chancellors and judges may interchange; Section 9905 providing that any Circuit judge may, upon notification of a cause in which the chancellor

is incompetent, take the place of the chancellor and hear and determine the cause as chancellor. The validity of these statutes with respect to the Constitution of the United States was not questioned nor was any Federal question raised. This is clearly shown by the disposition of these questions made by the Supreme Court of the State in its opinion:

> "The insistence of counsel for defendant that the case by tried de novo in this Court because of the constitutional right of free speech and the lack of jurisdiction of the Chancellor is wholly without merit." (R. 203).
>
> * * * * *
>
> "When the decree of disbarment was entered, the defendant prayed and was granted an appeal to the Court of Appeals. For the first time in the petition for the writ of certiorari he questions the validity of the judgment and decree of that Court on the ground that, since a constitutional question was raised, it had no jurisdiction. This assignment is overruled. No constitutional question was raised until after the Court of Appeals had acted. Had the question been made in good faith, the cause would have been transferred to this Court. It cannot be made for the first time in a petition for the writ of certiorari, especially so when it is not made in good faith and appears to be an afterthought."

Likewise, as to petitioner's contention that he was acting within his constitutional rights of criticism, the Court said:

> "The defendant seems to overlook the gravamen of the charge against him, that he made a charge that was false and malicious, and known to be, without any investigation, and that he was maliciously

abusing the court's process to retaliate against Boyd and Gerber. The case of In re: Hickey, 149 Tenn. 344, 347, 258 S.W., 417, does not support the defendant's contention. Hickey was not charged with abuse of the court's process maliciously or otherwise."

(3) The contention that the order of interchange was violative of the Fifth and Fourteenth Amendments to the Constitution of the United States was sought to be raised for the first time in Bomer's petition to rehear filed June 16, 1942 in the Supreme Court of the State.

Aside from the fact that the question was entirely without merit, under the established practice and decisions of the State Court, such a Federal constitutional question could not be raised for the first time either in the petition for certiorari or the petition to rehear in the Supreme Court of the State.

The Judges Cases, 102 Tenn. 508, 550-551.
Ogilvie vs. Holly, 141 Tenn. 392, 394.
State vs. Crump, 134 Tenn. 122, 143.
Moulton vs. State, 125 Tenn. 547, 566.

The Tennessee practice being as declared in the above cases, the challenge based upon Federal constitutional grounds for the first time sought to be advanced in the petition to rehear can not be availed of in this Court.

Memphis Natural Gas Company vs. Beeler, 315 U.S. 649; 86 L. Ed. 1090.

(4) It will be apparent from the matters hereinafter pointed out with respect of each of the specifications of error contained in Bomer's petition in this Court that the Federal questions sought to be presented are not substantial in character and that, aside from all other questions, jurisdiction, for that reason, should be declined.

Rule 12; Zach vs. King, 260 U. S. 174, 176, 177; 67 L. Ed. 194.

III.

Reply to Petitioner's Specifications of Errors

The opinion of the Supreme Court of Tennessee of June 2, 1942 (R. 200) is reported in 162 S. W. (2nd) p. 515, to which we here refer for the convenience of the Court. The case has not yet been published in the official reports.

This opinion sets out quite fully the history of the various steps as they were taken and the questions raised as to each.

As above pointed out, the Fourteenth Amendment of the Constitution of the United States now sought to be invoked as to the questions presented in the Specifications of errors was never mentioned either expressly or by remote inference until after the decision of the Supreme Court of June 2, 1942.

The attempt to inject such questions for the first time in the Supreme Court of the State by Petition to Rehear not only came too late, but clearly appears as an afterthought, not made in good faith and entirely without substance.

(1) Reply to Petitioner's First Specification:

This specification challenges (as a violation of the due process clause of the Fourteenth Amendment) the action of Chancellors Swepston and Bejach in presiding together as the Court, in the issuance of the Citation, the entry of the orders respecting the process thereunder, and in recusing themselves and entering the order for interchange. (Petition, p. 8.)

The course adopted (both in the filing on the Court's own motion of charges against Bomer and in recusing themselves and entering the order of interchange) was the course approved as the one required under the Tennessee Constitution and Statutes to assure the defendant a fair and impartial trial.

In Re: Cameron, 126 Tenn. 650.

There certainly could be no constitutional objection (and none was raised) with respect to the institution of the proceedings by the Chancellors, sitting together and acting as the Court, or to the order of the Court, setting forth that each of the Chancellors deemed it proper and the duty of each to recuse himself as incompetent and that notification had been given by them, respectively, to Judges Adams and Hamner, designating Judge Adams to sit by interchange in place of Chancellor Swepston, in whose Division the case was pending, and Judge Hamner to sit by interchange in the place of Chancellor Bejach.

Radford Trust Company vs. Lumber Co., 92 Tenn. 126.

This is purely a State question and the propriety in cases of public importance has long been recognized.

Memphis Power & Light Co vs. City of Memphis, 172 Tenn. 346, 367.

The appointment of counsel and other preliminary and ministerial actions dealing with the citation, process, etc., are necessarily and uniformly approved as proper to be taken before recusation.

30 Amer. Jurisprudence, Sec. 89, p. 803.

The only objection made by defendant to any act of Chancellors Swepston and Bejach was directed solely to the order under which Judges Adams and Hamner, respectively, sat as and in the place of said Chancellors; and defendant's sole objection to such order presented a matter of statutory construction in connection with defendant's reliance on Section 8689 of the Tennessee Code. (R. 92.)

The provision of **Section 8689** for change of venue in cases where the judge is incompetent **expressly** excepts from its application cases where provision has been made for the hearing and disposition of the cause at the trial term by a judge who is not incompetent, **sitting by interchange** or specially.

As pointed out in said opinion (R. 204): Section 9896 of the Tennessee Code expressly provides that Chancellors and Judges may interchange; Section 9905 provides that any Circuit Judge may "upon notification of a cause in which the Chancellor is incompetent, as provided in 9904, take the place of the Chancellor on the bench, and hear and determine the case as Chancellor."

The power and propriety of interchange was not superseded or abridged by any of the other sections of the Tennessee Code with respect to change of venue, transfer to another Court, or appointment of special judges. For instance, as part of the same enactment under which the Chancellors here acted (Section 9905), it was provided "as a further provision to prevent delay" (in cases of incompetency where the same has not been obviated of the Judge's own motion by interchange or appointment of a special judge) for transfer of the case to another Court.

In cases where the Chancellor of his own motion has recused himself for incompetency in accordance with the practice approved In Re: Cameron, supra, all other sections for change of venue, transfer or appointment of special judge become inoperative, subject always, of course, to the exception expressly recognized in the statutes that the judge or chancellor sitting by interchange shall not be incompetent to act.

In its opinion, the Supreme Court of Tennessee held (R. 204):

> "We find no merit in the defendant's assignment (1) wherein he claims that Article 1, Sections 8 and 17, of the Constitution (of Tennessee) was violated respecting the institution of disbarment by the Chancellors sitting together as one court. Either Chancellor would have had the right to enter the order of citation and the fact that it was entered by them jointly in no way jeopardized the rights and interests of the defendant. Either of the Circuit Judges was qualified under the Code to try the cause by interchange, and the fact that the two heard the case does not affect the merits of the controversy."

Neither the opinion of the Supreme Court of Tennessee denying certiorari, nor its opinion denying petition to rehear, nor its subsequent opinions denying leave to file additional petitions to rehear, make any mention of any Federal question.

Since it clearly appears that the validity of these statutes was neither drawn in question nor passed upon (in so far as any Federal question was concerned) in the Trial Court or the Court of Appeals, or deemed by the State Supreme Court to be in issue, there is a want of jurisdiction in this Court.

Memphis Natural Gas Co. vs. Beeler, Supra.

Looking to the merits of the question, it is clear, as pointed out in the opinion of the Supreme Court of Tennessee, there was no denial, either by the Statute or the action of the Court, of the right or opportunity to question the competency of the judges sitting by interchange; but Bomer, in fact, did question the competency of Judges Adams and Hamner on grounds totally without foundation, which were properly overruled. (R. 203-204.)

(2) Reply to Petitioner's Second Specification:

This specification challenges (as a violation of the due process clause of the Fourteenth Amendment) the decree of the two Circuit Judges presiding as one Court as Chancellors in the place and stead of Chancellors Swepston and Bejach, respectively. (Petition, 8-9.)

The only objections made by Bomer in the lower Court to the interchange by which Judge Adams and Judge Hamner were sitting in the places of Chancellor Swepston

and Chancellor Bejach, respectively, were upon the express grounds stated in his motion for change of venue or transfer to nearest Chancellor (R. 26) in reliance on Code Section 8689. (R. 92.)

Throughout, the actions taken were the actions of the Chancery Court of Shelby County, Tennessee. The petitioner, in effect, has at all times conceded that there can be no objection to the Chancellors sitting together where no disqualification of either exists.

Admittedly, Chancellor Swepston not only had the right, but the duty, to notify a Circuit Judge who was not incompetent to take his place. Likewise, Chancellor Bejach, laboring under the same incompetency, had the same right of notification to a Circuit Judge, who was not incompetent, to sit in his place.

This motion and its denial presented no Federal question. None was raised or could be raised.

In effect, this assignment is a repetition of the petitioner's first specification and everything said with respect to the first specification is applicable here.

(3) Reply to Petitioner's Third Specification:

This specification challenges (as a violation of the due process clause of the Fourteenth Amendment) an alleged denial to defendant Bomer of the opportunity of having the testimony of E. H. Crump who had been subpoenaed as a witness on behalf of the defendant Bomer. (Petition, p. 9.)

No Federal question was presented at any time with respect to the subject matter of this assignment.

The statement on which this assignment is predicated—that defendant was denied the opportunity of having the testimony of the witness, is not only not supported by the record, but the record is clear to the contrary. (R. 80-83.)

The basis of the decision of the Supreme Court of Tennessee appears in its opinion. (R. 207.)

Defendant Bomer did not question Mr. Crump's indisposition and inability to personally attend by reason of Mr. Dabney Crump's death; but on the other hand, Bomer's counsel stated that "when it comes down to a question of family sickness and death, those things like that," he, of course, could not question the same. (R. 80.)

Counsel for the State suggested that if defendant's counsel would indicate what they intended to prove by Mr. Crump, it was possible it might be stipulated, or if there was disclosed any material facts on which defendant Bomer desired to examine Mr. Crump, his deposition might be taken. (R. 80-83.)

Defendant's counsel stated that he had never interviewed Mr. Crump and declined to make any disclosure, either for the purpose of stipulation or deposition, but stated he would stand upon what he considered his "legal rights" to examine Crump on any and all matters that he might "feel pertinent." (R. 81.)

As stated in the opinion of the Supreme Court of Tennessee, the disbarment proceeding was not criminal in nature.

Davis vs. State, 92 Tenn. 634.

No application was in fact made for a continuance or for compulsory process then or at a later date.

In a proceeding not criminal in nature, no application for compulsory process could have been demanded on constitutional grounds.

There was no denial of the right or opportunity to defendant of having the testimony of the witness which he had summoned, but who was at the time prevented by disability from attending in person.

The Supreme Court of Tennessee found:

> "The record clearly shows that Mr. Crump's deposition could have been taken, but defendant's counsel refused to take it, although relator agreed to it."

CONCLUSION

The Petition filed in this Court states that there is presented with the Petition a certified copy of the transcript of the record and that there is also presented petitioner's Brief for consideration with the Petition.

Service was made upon counsel for the State on February 5th, 1943, of a typewritten, certified copy of the Record and what purports to be a copy of a "Petition for a Writ of Certiorari," neither of which had been filed in the Office of the Clerk of this Court.

No service or notice was given counsel for the State "of the filing" of the Petition and Record, as provided by Rule 38, and no supporting brief has been served on or presented to counsel for the State, who only learned on February 23, 1943, by inquiry of the Clerk of this Court that the Petition and Record had been filed on February 8, 1943.

Both the Petition and petitioner's praecipe state that "there is no dispute on the facts" and that he accepts the findings of facts of the Court of Appeals and the Supreme Court (Petition, p. 12, R. 301), for which reason none of the testimony was included in the record. (R. 301; R. 303.)

The utter lack of substance in the questions now advanced as "Federal questions," however, can be readily appreciated in the following summary of the facts as found by the trial Court and Court of Appeals:

> "In determining the question of malice, it is proper for the Court to consider the entire record, including the bill and answer, as well as attending circum-

stances. The trial court and the Court of Appeals in passing upon this question must have been impressed with the undisputed fact that the defendant did not file his disbarment suit against Marion Boyd until the latter was being considered for appointment as Judge of the United States District Court for West Tennessee, and at the time the suit was filed he stated to the Clerk and Master that 'he did it out of revenge'; that he further stated to Hugh Stanton he was going to file disbarment proceedings against Boyd and Gerber and every member of the Association who had anything to do with the disbarment proceedings against him and would 'pauperize' them. It is further shown by the testimony of C. A. Davis that, in filing the suit against Boyd, it was with the express purpose of defeating his appointment as federal judge." (R. 208-209.)

Respectfully submitted,

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